

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

ARKANSAS CABLE TELECOMMUNICATIONS
ASSOCIATION; COMCAST OF ARKANSAS, INC.;
BUFORD COMMUNICATIONS I, L.P. d/b/a
ALLIANCE COMMUNICATIONS NETWORK;
WEHCO VIDEO, INC.; COXCOM, INC.; and
CEBRIDGE ACQUISITION, L.P., d/b/a
SUDDENLINK COMMUNICATIONS,

Complainants,

v.

ENTERGY ARKANSAS, INC.,

Respondent.

EB Docket No. 06-53

EB-05-MD-004

FILED/ACCEPTED

FEB - 5 2007

Federal Communications Commission
Office of the Secretary

To: The Honorable Arthur I. Steinberg
Office of the Administrative Law Judge

OPPOSITION TO MOTION TO STRIKE

Complainants Arkansas Cable Telecommunications Association, Comcast of Arkansas, Inc., Buford Communications I, L.P. d/b/a/ Alliance Communications Network; WEHCO Video, Inc., CoxCom, Inc. and Cebriidge Acquisition, L.P., d/b/a Suddenlink Communications ("Complainants") hereby respectfully request that the Hearing Officer deny the Motion to Strike filed on February 2, 2007, by Respondent Entergy Arkansas, Inc. ("Entergy").

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improper conduct, *Response* at 4, and offered several propositions of law that were, at best, misleading, *Response* at 3, 11. On February 1, Complainants filed their Reply, pointing out the numerous mischaracterizations in Entergy's Response and offering the Hearing Officer additional precedent on the relevant points of law.

On February 2, Entergy filed its Motion to Strike Complainants' Reply. It argued that Complainants' Emergency Motion was an "interlocutory request," see 47 C.F.R. § 1.294, that all subsequent related filings are governed by Rule 1.294, and that under that Rule Complainants had to seek authorization from the Hearing Officer in order to file a reply brief.

II. DISCUSSION

A. The Hearing Officer Should Find That The Little-Used Rule Cited By Entergy Does Not Apply Here.

As an initial matter, it is not at all clear that Complainants need authorization to file the Reply. Under the Commission's generally applicable rules on proceedings, a party that files an original pleading may file a reply to any opposition within five days after the time for filing that opposition expires. See 47 C.F.R. § 1.45(c). That rule permitting replies as a matter of right is applicable "[e]xcept as otherwise provided in this chapter." *Id.* § 1.45.

Section 1.294, the rule to which Entergy refers, creates such an exception: It requires authorization from the Hearing Officer before a party may file a reply to an opposition to an "interlocutory request." 47 C.F.R. § 1.294(a), (d). However, "interlocutory request" is not defined, and Complainants have found no cases in which the Commission has applied the term (or the rule) to motions involving discovery

disputes. Instead, when it is used at all—which is extremely infrequently ^{1/}—Section 1.294's "interlocutory request" rule typically has applied to filings such as petitions to intervene in an existing dispute, see, e.g., *Application of Ellis Thompson Corp.*, 10 FCC Rcd 11434, 11435, ¶ 6 (1995), and petitions to reopen the record, see, e.g., *Applications of Theodore Granik*, 12 F.C.C. 2d 208, n.3 (1968). Since it is not clear that Section 1.294 applies, the Hearing Officer should simply apply Section 1.45 and accept Complainants' Reply as a filing made as of right.

B. To The Extent Authorization Is Required, Good Cause Exists For the Hearing Officer To Grant It.

If the Hearing Officer decides that Rule 1.294 does apply here, however, Complainants respectfully request that this Opposition be construed as a request for authorization to file the Reply. Section 1.294(d) gives the Hearing Officer explicit power to grant such authorization and accept the Reply. See *id.* (stating that additional pleadings may be authorized "by the person[] who is to make the ruling") see also *id.* § 1.3 (giving the Commission and its designees the general power to waive Commission rules). Such authorization may be granted for good cause shown. See *Applications of Cosmopolitan Enterprises, Inc.*, 58 F.C.C. 2d 21, n.1 (Rev. Bd. 1976). This is not a difficult hurdle to meet: The Commission has granted authorization to file replies under Section 1.294(d) in a whole range of circumstances, including where the reply would be "helpful in resolving the questions raised by the opposition pleadings," *Applications of Mid-Florida Television Corp.*, 76 F.C.C. 2d 158, n.6 (1980), where the reply would help create "a complete record," *Mediacom Southeast LLC*, 18 FCC Rcd 7718, 7718 n.4

^{1/} Section 1.294 has apparently been applied only once in the last 10 years to reject a reply filing, and that case did not involve a discovery issue. See *In re Applications of Rio Grande Broadcasting*, 14 FCC Rcd 11088, 1194 & n.17 (1999).

(2003), and where the contentions raised in the initial pleading and opposition are particularly serious, *Applications of Henry R. Malloy Jr.*, 10 FCC Rcd 503, n.9 (1995). The Commission has been especially willing to grant the authorization to file a reply where the opposing party alleges no resulting prejudice. See, e.g., *Applications of RKO General Inc.*, 89 F.C.C. 2d 297, n.126 (1982).

The Hearing Officer should grant Complainants authorization to file the Reply here (if such authorization is needed) because all of the above factors are present:

- First, the Reply would be helpful in resolving the serious questions raised in the Emergency Motion and Response, in part because it corrects inaccurate propositions of law offered by Entergy and offers additional relevant precedent bearing on the issues to be resolved.
- Second, the Reply would create a complete record by alerting the Hearing Officer to the arguments Complainants may make at a subsequent hearing on the Emergency Motion. This factor is particularly important here because Entergy used its Response to accuse Complainants and their counsel of misconduct; Complainants' Reply is their first and only chance to respond in writing. See *Mediacom Southeast LLC*, 18 FCC Rcd 7718, n.4 (accepting reply and other subsequent filings where those filings allowed "both parties to fully articulate their positions. . .").
- Third, the issues raised in the Emergency Motion are serious and extraordinary, not routine. Complainants have laid out a detailed case that Entergy despoiled relevant documents and otherwise refused to comply with its discovery obligations. As in *Applications of Henry R. Malloy Jr.*, the seriousness of the issues raised in Complainants' Emergency Motion alone is sufficient to create good cause to authorize Complainants' reply filing. See 10 FCC Rcd 503, n.9 (authorizing reply where the initial filing sought disqualification of opponents' counsel).
- Fourth, Entergy nowhere alleges that it would be prejudiced if the Reply were to be accepted.

In short, good cause to authorize Complainants' Reply is present in spades. To the extent authorization pursuant to Section 1.294(d) is required,

CERTIFICATE OF SERVICE

I, Dominic F. Perella, hereby certify that on February 5, 2007, a copy of the foregoing **OPPOSITION TO MOTION TO STRIKE** was hand-delivered, and/or placed in the United States mail, and/or sent via electronic mail, postage prepaid, to:

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